

FEDERAL MAGISTRATES COURT OF AUSTRALIA

LEE v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 286

MIGRATION – Review of the Administrative Appeals Tribunal decision – refusal of a protection visa – no reviewable error – application dismissed.

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), s.475A

Blanco v Minister for Immigration [2005] FMCA 136

1. *Chiropractors Association of Australia (SA) & Anor v WorkCover Corporation* [1999] SASC 120

2. *Chiropractors Association of Australia (SA) & Anor v WorkCover Corporation* [1999] SASC 470

Craig v State of South Australia [1995] HCA 58

Djalil v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 151

Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389

3. *Inderjit Singh v Minister for Immigration & Multicultural Affairs* [1998] 1366 FCA

Kioa v West (1985) 159 CLR 550

4. *Minister for Immigration & Ethnic Affairs v Pochi* [1979] 44 FLR 41

5. *Minister for Immigration & Multicultural Affairs v Al-Miahi* [2001] FCA 744

6. *Minister for Immigration & Multicultural & Indigenous Affairs v W306/01A* [2003] FCAFC at 208

7. *NAAX v Minister for Immigration & Multicultural Affairs* (2002) 119 FCR 312

NAHD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 214 ALR 264

Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476

Re Barnett v Minister for Immigration & Indigenous Affairs [2003] AATA 1065

Re Hapugoda & Minister for Immigration & Multicultural & Indigenous Affairs [2002] AATA 330

Re Michael Alexander McCutcheon v Minister for Immigration & Ethnic Affairs AAT no.79/18006

Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 211 CLR 441

Re Reng Shang Qiu v Minister for Immigration & Multicultural & Indigenous Affairs [2004] AATA 828

8. *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82
SAAP & Anor v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 24

9. *Steed v State Government Insurance Commission* (1986) 1961 CLR 144
VAF v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 206 ALR 471

Applicant:	PAUK LAIN LEE
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File No:	SYG3196 of 2004
Delivered on:	17 March 2006
Delivered at:	Sydney
Hearing date:	12 September 2005
Judgment of:	Lloyd-Jones FM

REPRESENTATION

Solicitor for the Applicant:	Mr R Turner
Counsel for the Respondent:	Mr A McInerney
Solicitors for the Respondent:	Blake Dawson Waldron Lawyers

ORDERS

- (1) The Administrative Appeals Tribunal is joined as the second respondent.
- (2) The application is dismissed.

- (3) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG3196 of 2004

2. PAUL LAIN LEE
Applicant

And

**3. MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**
First Respondent

4. ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The Proceedings

10. These proceedings were commenced by an application under s.39B of the *Judiciary Act 1903* (Cth) (“the Judiciary Act”), filed in the Sydney Registry of the Federal Magistrates Court on 28 October 2004 for a judicial review of the decision of the Administrative Appeals Tribunal (“the Tribunal” or “the AAT”). It was made on 1 October 2004, affirming the decision of the delegate of the first respondent (“the delegate”) made on 11 August 2003, refusing to grant the applicant’s spouse a subclass 309 Spouse (provisional) Visa. The issues for the Tribunal to determine were:
 - (a) whether the visa applicant was not of good character such as to be precluded from the grant of a subclass 309 spouse (provisional) visa; and
 - (b) if the Tribunal was satisfied that the visa applicant was not of good character, whether to exercise discretion under s.501(1) of the *Migration Act 1958* (Cth) (the “Act”) to refuse to grant the visa.
11. The applicant has not sought to join the Tribunal as a party, however, given that it is an exercise of the Tribunal’s jurisdiction that is under review, I will make the appropriate order that the Tribunal be joined as a party: *SAAP & Anor v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 24 at [43], [91], [153] and [180].
12. The solicitor appearing for the applicant tendered and applied for the affidavit of Raymond Charles Turner, affirmed on 12 September 2005, (“the affidavit of Mr Turner”) to be admitted into evidence. Attached to the affidavit is a transcript of the proceedings before the Tribunal, prepared by Auscript Australia Pty Ltd who made the recording of those proceedings. A Court Book (“CB”) prepared by the respondent’s solicitors was filed and served on 2 March 2005.

Background

13. The applicant, Pauk Lain Lee, is an Australian citizen who sponsored the visa applicant’s application for an Australian visa. The visa

applicant, Lin Guo, was born in China on 27 October 1971. He came to Australia on 28 February 1996 on a short stay visitor's visa, valid until 31 March 1996. He subsequently applied for two protection visas which were refused. Mr Guo remained in Australia unlawfully and was located by the Department on 1 May 1999. Mr Guo departed Australia on 1 June 1999 and on 21 November 2002 lodged an offshore application for a sub-class 309 Spouse (provisional) Visa.

14. A delegate of the first respondent stated that Mr Guo entered Australia using a false passport obtained with false documents and issued in a false name from a person involved in organised crime. Hence he applied for a protection visa and a number of bridging visas in the false name. Also he remained in Australia unlawfully and worked without permission while unlawful; and he has made false and misleading statements in his spouse visa application. The delegate therefore refused Mr Guo's spouse visa application (CB 333).
15. On 24 April 2003, the applicant applied to the Tribunal for review of the delegate's decision. On 1 October 2004, the Tribunal affirmed the delegate's decision. It is the Tribunal decision which is the subject of this application to this Court.

Tribunal's Findings and Reasons

16. A convenient summary of the Tribunal's reasons was contained in the respondent's written submissions prepared by Mr A McInerney and I adopt paragraphs 4 to 11 inclusively of those submissions:

[4] The Tribunal made a number of adverse findings of fact in respect to the claims put forward to the Tribunal by the applicant. The Tribunal found that:

- (a) the applicant had committed a number of breaches of the immigration legislation [CB353.4].*
- (b) the applicant had engaged the services of, and had more than a fleeting association with, a person he knew to be a people-smuggler [CB353.5].*
- (c) the applicant obtained from him a false passport and visa to enter Australia, he entered Australia using the false passport and visa issued to another*

person, and identified himself as that person [CB353.5].

- (d) the applicant had in his possession and under his control a visa granted to another person, he made false and misleading declarations in a protection visa application dated 12 May 1997, including as regard to his name, his date of birth and that he was persecuted in China, inter alia, because of his religion, in circumstances where there was no evidence, even from the applicant himself, that he had been persecuted for any reason;*
- (e) he overstayed his tourist visa and two bridging visas for a total period of 19 months;*
- (f) he made no attempt to depart Australia until he was detected by compliance officers;*
- (g) while an unlawful non-citizen he worked in Australia without lawful permission to do so, and at all times intended to work when he came to Australia on his tourist visa [CB353.5-CB353.8];*
- (h) on the basis of the applicant's association, multiple breaches and instances of deceitful conduct, that the applicant was not a person of good character [CB353.9].*

[5] The Tribunal formed an adverse view as to the credibility of the applicant. The Tribunal did not accept the evidence he gave to the Tribunal. An adverse finding as to credibility is a function of the primary decision maker par excellence: Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407 at [67], per McHugh J.

[6] Having rejected the applicant's contentions for want of credibility, and having found various breaches of the law by the applicant, the Tribunal properly concluded that the applicant was not of good character.

[7] As to the first of the primary considerations set out in the Direction issued under s499 of the Act, as to whether or not the Tribunal should exercise its discretion not to refuse a grant of the visa, having regard to the protection of the Australian community, the Tribunal found that:

- (a) *the applicant's breaches of the Act both individually and especially cumulatively, were particularly serious [CB355.2];*
- (b) *the applicant plainly knew that he was claiming refugee status on non-existent grounds which was a very serious breach of the law [CB355.9];*
- (c) *the applicant's wrongful conduct had persisted over a long period of time [CB356.4];*
- (d) *the applicant attempted to maintain his deception when questioned by the officers who apprehended him, and was less than truthful in his evidence at the hearing [CB356.5];*
- (e) *the applicant's willingness to deal with a criminal, and the fact that his breaches of the Act were multiple, varied and recurring over a significant period of time, led the Tribunal to conclude that there was a real risk that he would commit similar offences in the future, or would engage in misleading or deceptive conduct in breach of other Australian laws [CB356.5-CB356.6];*
- (f) *the applicant was a knowing participant in the unlawful scheme, in which Mr Wang, the people-smuggler was engaged [CB356.8].*

[8] *As to the second of the primary considerations, that is, the expectations of the Australian community, the Tribunal found that:*

- (a) *the refusal of a spouse visa would dissuade others from committing similar [unlawful] acts, and from engaging the services of criminals who practise people-smuggling [CB357.9].*
- (b) *the community expects that the migration program will be administered in such a manner as to favour those who obey the law rather than those who seek to subvert it. That expectation weighed against the grant of a visa in the present case [CB358.3].*

[9] *The applicant relied on two matters relevant to the exercise of the Tribunal's discretion under s501(1) not to refuse the grant of the visa. The first was the fact of his marriage to Mrs Lee, and the disruption on that marriage*

which would be caused by refusal of the visa. As to that matter, the Tribunal found that Mrs Lee admitted at the hearing that she was aware from the start of her relationship with the applicant in 1996 that the applicant was in Australia on a false passport, and that she would have been aware that the applicant's presence in Australia was unlawful [CB361.9].

[10] The second matter relied upon by the applicant related to the hardship which, it was alleged, would be suffered by Mrs Lee by reason of her health problems if she moved to China to be with her husband, the applicant. As to this matter, the Tribunal found that Mrs Lee would suffer some hardship as a result of her health problems if the applicant were refused a spouse visa and she were to relocate to China [CB362.8].

[11] As to more generally based connection that Mrs Lee's life would be disrupted by relocation to China, the Tribunal observed that her cultural background was predominantly Chinese, she had lived for 10 years in Macau, she mainly spoke Cantonese and spoke very little English, and that she had chosen to develop a relationship with the applicant knowing that he was in Australia on a false passport, that he was not a refugee, and in circumstances where there was a strong possibility that he would never receive a visa to remain in or return to Australia [CB362.9].

Application review of the tribunal's decision

17. On 28 October 2004, the applicant filed an application for review under s.39B of the Judiciary Act setting out the following grounds:

[1] The applicant was denied procedural fairness/natural justice.

(a) The Tribunal found at paragraph 27 that "... particularly in light of what is known about Fuqing City's role as a major centre for the people-smuggling traffic" this belief held by the Tribunal was not put to the applicant during the hearing, nor was she given an opportunity to comment upon it.

(b) the Tribunal had evidence before it that the applicant's psychological condition "could influence her access to such memories because of

lessened concentration” yet it relied upon inconsistencies in her recall of events to make adverse findings of credibility against her and her husband.

[2] *The Tribunal applied the wrong test.*

- (a) *The Tribunal found that the visa applicant did not pass the character test in part because he had made “false or misleading statements in connection with entry or stay in Australia” and that such statements “are to be treated as very serious” paragraph 66. The operation of the Migration Act 1958 sections 234 and 499 requires that the statements must be false or misleading in a material particular. Further, the preamble to Direction No. 21 explains that the exercise of the power under section 501 of the Migration Act as: “The Minister has a responsibility to the Parliament and to the Australian community to protect the community from criminal or other reprehensible conduct and to refuse to grant visas and to cancel visas held by non-citizens whose actions are so abhorrent to the community that they should not be allowed to enter or remain in it.” The Tribunal failed to consider whether the visa applicant’s conduct was of such a kind.*
- (b) *The Tribunal found, by implication, that by consistently blaming others for admitted violations of immigration law that the visa applicant was entirely responsible for those violations without making a finding as to where the blame fairly lay. Consistent blaming of others does not, of itself, support a finding that the blamer is entirely liable.*
- (c) *The Tribunal considered the nature of the relationship between the applicant and her husband in 1996 when the relevant application for a visa was made on 21 November 2002 and relied upon the couple’s marriage on 14 March 2002.*
- (d) *The Tribunal found that any association with a criminal was sufficient to support a finding that a person does not pass the character test at paragraph 58. Association as a victim of a criminal*

does not in itself cause a person to fail the character test.

- (e) The Tribunal found that “the Minister may properly decide for any one of a number of reasons to use the remedy for visa refusal instead (of prosecution). The operation of section 501 of the Act nor Direction No. 21 play no part in the criminal or prosecution law of Australia.*

[3] The Tribunal failed to take account of relevant considerations.

- (a) The Tribunal failed to take into consideration that the medication being taken by the applicant could only be obtained if the applicant personally attended a doctor in Australia. Her family could not, therefore, contrary to the finding by the Tribunal, arrange to have such products sent to her in China.*
- (b) The visa applicant’s affirmed evidence that he did not know that the person who arranged his passport and travel to Australia was a criminal until after his return to China.*
- (c) That the visa applicant signed blank forms which were then filled out by his agents.*

[4] The Tribunal took account of irrelevant considerations.

- (a) “...that he (the visa applicant) was not invited by his solicitor to say anything about how he proposed that they should live in Australia, whether he would be able to find work, given his lack of English, where they would live or how they would maintain themselves financially, nor was there anything in the documentary evidence on those topics.” Paragraph 43.*

[5] The Tribunal failed to base its decision on evidence and/or based its decision on mere speculation.

- (a) “particularly in light of what is known about Fuqing City’s role as a major centre for the people smuggling office traffic of which more is said below” paragraph 27.*

- (b) *“Even then, he attempted to maintain the deception until questioning by departmental officers forced him to admit that he entered Australia under a false passport and was still using that identity” paragraph 35.*
- (c) *“The true situation would appear to be that Mrs Lee did spend school holiday times in Sydney with Mr Guo more than once, but not, contrarily to her assertion, during every school holidays over that period”. Paragraph 41.*
- (d) *“Mr Guo claimed and still claims to be a Christian but I am not persuaded of that.” Paragraph 67.*
- (e) *“These matters invoke sympathy and merit compassionate consideration. Nevertheless, they stem from choices freely made by the parties in full knowledge of the facts and the risks involved”. Paragraph 87.*

The law

18. The present application is affected by the privative clause contained in s.474 of the Act. The High Court in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 and *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, held in broad terms that the privative clause does not protect Tribunal decisions that are affected by jurisdictional error or bad faith: *Plaintiff S157/2002* at [76] and *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002* at [15].
19. An administrative tribunal exceeds its powers and thus commits a jurisdictional error if it identifies a wrong issue, asks a wrong question, ignores relevant material, relies on irrelevant material or, in some circumstances, makes an erroneous finding or reaches a mistake and conclusion in the way that affects the exercise or purported exercise of the Tribunal’s power: *Craig v State of South Australia* [1995] HCA 58 per McHugh, Gummow and Hayne JJ at [179] and *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389.

Reasons

20. This matter came before Registrar McIllhatton on the first court date on 10 November 2004 but was adjourned to 16 November 2004. On 16 November 2004 the parties were provided with a timetable to enable them to file a notice of motion to transfer the proceedings to the Federal Court. That notice of motion was to be filed by 30 November 2004. The respondent was to file any written submissions in respect of the motion by 7 January 2005 and the applicant by 14 January 2005.
21. The motion to transfer the proceedings was listed for hearing on 21 January 2005 before me. Prior to that date, the parties agreed between themselves not to seek a transfer and signed consent orders, prior to 21 January, seeking to proceed in the Federal Magistrates Court (“the FMC”). The matter was set down for final hearing on 12 September 2005 which proceeded on that date. At the end of the hearing on 12 September the matter was adjourned and leave granted to both parties to file further submissions in respect of issues that arose during the hearing.
22. One of the issues I raised was the fact that the decision of the Tribunal was made by a Deputy President and no submissions were made by the parties as to what significance this fact had on the exercise of this Court’s jurisdiction in the matter. The *Administrative Appeals Tribunal Act 1975* (Cth) (“the AAT Act”) sets out the general policy on the issue of jurisdiction and, in particular, the issue of the Federal Magistrates Court reviewing certain decisions of the Tribunal.
23. Section 44 of the AAT Act provides for appeals to the Federal Court for decisions of the AAT. Section 44AA of the AAT Act provides for transfers of appeals from the Federal Court to the FMC. However, s.44AA(2) of the AAT Act provides that the Federal Court must not transfer appeals to the FMC if the appeal relates to an AAT decision constituted by a member or by a panel of members, at least one of whom is a Presidential Member. A Presidential Member is defined in the AAT Act as the President, a Deputy President or a member who is a Judge. Therefore under these provisions in the AAT Act, a decision made by a Presidential Member, either sitting alone or as a panel member is usually not reviewed by the FMC.

24. However, an appeal under s.44 of the AAT Act is not the only avenue open to a party for judicial review of AAT proceedings. A party may seek review of the administrative decision under an *Administrative Decision (Judicial Review) Act 1977* (Cth) (“the ADJR Act”). Sections 5 to 7 of the ADJR Act provide that an application for review of the decision (s.5) conduct relating to the making of the decision in (s.6) and in respect of failure to make a decision (s.7) may be made in either the Federal Court or the FMC. It is therefore possible for a person to seek a review in the FMC for a decision made by a Presidential Member of the AAT. This is an inconsistency that currently exists between these Acts. The parties were invited to make submissions in respect of the policy reflected in s.44AA(2) of the AAT Act relating to the transfer of a matter to the Federal Court. The parties we refer to the decision of Smith FM on this specific issue: *Blanco v Minister for Immigration* [2005] FMCA 136.
25. In response to my request the parties indicated that where the application was argued in regard to s.39B of the Judiciary Act, and where the matter has been fully argued, the Court should determine the matter having regard to the arguments previously ventilated before it. The parties submitted that the Court has jurisdiction to determine the application and the issue arising, as to whether in the circumstances the Court should exercise its discretion to transfer the matter to the Federal Court. Both parties submitted that the Court has jurisdiction to determine the matter and the matter has been fully argued. The preferable course in the interest of justice would be for this Court to determine the application.
26. The parties also submitted supplementary submissions as directed at the hearing on 12 September 2005.
27. The applicant submits that the Tribunal committed the following jurisdictional errors:
- (a) The applicant was denied procedural fairness;
 - (b) The Tribunal applied the wrong test;
 - (c) The Tribunal failed to take account of irrelevant considerations;
 - (d) The Tribunal took account of irrelevant considerations; and

- (e) The Tribunal failed to base its decision on evidence on mere speculation.

28. Mr Turner, appearing for the applicant, referred to the Tribunal's failure to put the following concern to the applicant for comment (CB 340):

...particularly in light of what is known about Fuqing City's role as a major centre for people-smuggling traffic...

29. He submitted that a failure to put material adverse to the applicant to her for comment is a failure to provide the applicant with procedural fairness: *Kioa v West* (1985) 159 CLR 550 per Brennan J at [38]. The Tribunal failed to accord the applicant a fair hearing by relying on inconsistencies in her evidence to make an adverse finding against her and Mr Guo's credit (CB 340). It did so even when it had evidence before it that her psychological condition affected her concentration and memory (CB 328). It was submitted that this was a failure to provide the applicant with a fair hearing and therefore a failure to provide procedural fairness.

30. Mr McInerney for the respondent submitted that there were two issues before the Tribunal: first the applicant's character, and secondly the exercise of discretion by the Tribunal in refusing to grant the visa. As to the first matter, the Tribunal found that the applicant had "committed a number of breaches of the immigration legislation" (CB 353.3). It was submitted that the Tribunal made a number of alternative and independent findings of breach of the immigration regulations by the applicant. Even if one were to disregard the finding that the applicant had engaged the services of, and had a more than fleeting association with, a person he knew to be a people-smuggler, Mr Turner made no challenge to the following facts:

- (a) The applicant entered Australia using a false passport and a visa issued to another person, and identified himself as that person;
- (b) The applicant had in his possession and under his control a visa granted to another person;
- (c) The applicant made false and misleading declarations in his protection visa application;

- (d) The applicant overstayed his tourist visa and two bridging visas for a total period of 19 months;
- (e) The applicant made no attempt to depart until he was detected by compliance officers; and
- (f) While an unlawful non-citizen, the applicant worked in Australia without permission and indeed at all times intended to work when he came to Australia on a tourist visa.

31. There is no basis to impugn the finding of fact made by the Tribunal that the applicant was not a person of good character (CB 353.9).

32. More specifically, in respect of the applicant's character, Mr McInerney makes the submissions that the finding made by the Tribunal – that the applicant had engaged the services of, and had more than a fleeting association with, a person he knew to be a people-smuggler – was well open to the it. The Tribunal had regard to the prior inconsistent statement made by the applicant to the immigration officer at the Australian Consulate on 4 March 2003, in which the applicant acknowledged that he had purchased a passport in the name of Jiang from a “snakehead”, Mr Wang for a total of 130,000RMB (CB 163-165, 336.8). Mr Turner, who also appeared at the Tribunal hearing, conceded that the applicant knew that Mr Wang was a people-smuggler (CB 356.7).

33. Mr McInerney submits that the complaint made by Mr Guo – that he was denied procedural fairness (see paragraph 16) – is directed to the first of the primary considerations the Tribunal had in assessing whether or not to exercise its discretion to refuse to grant him a visa. The visa applicant's contention was that his association with a people-smuggler was not sufficiently serious to give rise to any concern that the community at large would require protection from him. As Mr Guo himself was “a victim of crime”, he “could not fail the character test because of his association with a criminal” (CB 356.3). However, the Tribunal found that the applicant was “a knowing participant in the unlawful scheme” (CB 356.3). The Tribunal made the observation that it was inconceivable that the applicant would not have been aware that he was assisting a criminal enterprise (CB 357.1). It was submitted

that the Tribunal's passing observation on this issue was nothing more than "species of dicta": *VAF v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 206 ALR 471 at [33].

34. Mr McInerney submitted that a person's whose interests are likely to be affected does not have to be given an opportunity to comment on "every adverse piece of information, irrespective of its credibility, relevance or significance". Administrative decision-making is not to be clogged by enquiries into allegations to which the repository of power would not give credence, or which are not relevant to his decision or of insignificance to the decision to be made. Administrative decisions are not necessarily invalid because procedures of adversary litigation are not fully observed: *Kioa v West* per Brennan J at 628 to 629.
35. The respondents submit that the Tribunal's reference to its earlier decisions in *Re Barnett v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] AATA 1065 and *Re Reng Shang Qiu v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] AATA 828 did not lead to any findings of fact which had any determinative effect. These two decisions were the subject of supplementary submissions. Mr McInerney contends that there is no obligation on the part of the Tribunal to raise those decisions with the applicant in circumstances where the applicant is legally represented, and the applicant's legal representative is taken to know, and he is in a position to meet, decisions of the Tribunal which raise similar issues of fact. Further, in respect of those two decisions they were of "little significance to the decision which is to be made" that there was no requirement to raise the issue with the applicant for his comment: *Kioa v West* per Brennan J at 628 to 629. Mr McInerney argued that even if the Tribunal erred in failing to raise with the applicant the Tribunal's previous decisions, such failure on the part of the Tribunal could not make any difference to the outcome: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 per Kirby J at [131]-[132]; see also *Steed v State Government Insurance Commission* (1986) 161 CLR 144 at 145.
36. Mr McInerney said that it is clear from many authorities that an administrative decision-maker may make use of the knowledge, experience and expertise he or she possesses without having to disclose that material to the applicant. Nor having to disclose how the material might be used:

Chiropractors Association of Australia (SA) & Anor v WorkCover Corporation [1999] SASC 120 per Doyle CJ at [87]. That case was upheld on appeal: *Chiropractors Association of Australia (SA) & Anor v WorkCover Corporation* [1999] SASC 470. Mr McInerney submits a Tribunal member is no different from an ordinary administrator or jury person and is entitled to use his or her knowledge and experience to assess the credibility of what is being put before them. It is not realistic to expect compartmentalisation of knowledge; neither is it feasible to disclose all such knowledge or experience: *NAAX v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 119 FCR 312 per Gyles J at [84].

37. The second issue in respect of the procedural fairness ground is the exercise of discretion by the Tribunal to refuse to grant a visa. The complaint is that the visa applicant was denied procedural fairness because the Tribunal relied upon inconsistencies in Mrs Lee's evidence to make adverse finding as to her and her husband's credibility. Yet Mrs Lee's circumstances were only relevant to the second issue the Tribunal had to decide, that being its exercise of discretion. Representatives for the applicant did not identify any findings of fact made by the Tribunal where it could be alleged that it relied upon inconsistencies in the evidence of Mrs Lee to make an adverse finding as to her credit. In respect of Mrs Lee, the Tribunal found that:

- (a) She was aware from the start of her relationship in 1996 with the applicant that he was in Australia on a false passport and his presence in Australia was unlawful (CB 361.9);
- (b) She would suffer some hardship as a result of her health problems if the applicant was refused a spouse visa and she were to relocate to China (CB 362.2); and
- (c) She would suffer some disruption by reason of her relocation to China (CB 362.7).

38. There is no proper basis to impugn the findings of fact made in respect of Mrs Lee.

39. In respect of the second ground, which is referred to by Mr Turner as the wrong test, the Tribunal found that the visa applicant did not pass the character test in part because he had made an "false or misleading statement

in connection with the entry or stay in Australia” and that such statements “are to be treated as very serious”. (Decision record [66], CB 354).

40. The relevant provisions used in determining the character test are found in ss.234, 499 and 501 of the Act:

s.234 False papers etc.

(1) *A person shall not, in connexion with the entry, proposed entry or immigration clearance, of a non-citizen (including that person himself or herself) into Australia or with an application for a visa or a further visa permitting a non-citizen (including that person himself or herself) to remain in Australia:*

- (a) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document which is forged or false;*
- (b) make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that, to the person’s knowledge, is false or misleading in a material particular; or*
- (c) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise furnish, or cause to be furnished for official purposes of the Commonwealth, a document containing a statement or information that is false or misleading in a material particular.*

(2) *A person shall not transfer or part with possession of a document:*

- (a) with intent that the document be used to help a person, being a person not entitled to use it, to gain entry, or to remain in, Australia or to be immigration cleared; or*
- (b) where the person has reason to suspect that the document may be so used.*

Penalty...

s.499 Minister may give directions

(1) *The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:*

- (a) *the performance of those functions; or*
- (b) *the exercise of those powers.*

(1A) *For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.*

Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.

...

s.501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate – natural justice applies

(1) *The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.*

Note: Character test is defined by subsection (6)

(2) *The Minister may cancel a visa that has been granted to a person if:*

- (a) *the Minister reasonably suspects that the person does not pass the character test; and*
- (b) *the person does not satisfy the Minister that the person passes the character test.*

Decision of Minister – natural justice does not apply

(3) *The Minister may:*

- (a) *refuse to grant a visa to a person; or*
- (b) *cancel a visa that has been granted to a person;*

if:

- (c) *the Minister reasonably suspects that the person does not pass the character test; and*
- (d) *the Minister is satisfied that the refusal or cancellation is in the national interest.*

- (4) *The power under subsection (3) may only be exercised by the Minister personally.*
- (5) *The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).*

Character test

- (6) *For the purposes of this section, a person does not pass the character test if:*
 - (a) *the person has a substantial criminal record (as defined by subsection (7)); or*
 - (b) *the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or*
 - (c) *having regard to either or both of the following:*
 - (i) *the person's past and present criminal conduct;*
 - (ii) *the person's past and present general conduct;**the person is not of good character; or*
 - (d) *in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:*
 - (i) *engage in criminal conduct in Australia; or*
 - (ii) *harass, molest, intimidate or stalk another person in Australia; or*
 - (iii) *vilify a segment of the Australian community; or*
 - (iv) *incite discord in the Australian community or in a segment of that community; or*
 - (v) *represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.*

Otherwise, the person passes the character test.

...

41. On 23 August 2001, the then Minister exercised his power under s.499(1) of the Act by issuing “Direction No. 21 – Visa refusal” and cancellation under s.501 of the Act. The preamble to the Direction states that it “provides guidance to decision-makers in the making decisions to refuse or cancel a visa under s.501 of the Act”. The Direction provides guidance on application of the character test and on the consideration to which decision-makers must have regard when notwithstanding that a person does not pass the character test, exercising the discretion to decide whether or not a non-citizen should be permitted to enter or remain in Australia.
42. Mr Turner contended that the Tribunal failed to consider whether the visa applicant’s conduct was of such a kind that he would fail the requirements of the character test as set out in the provisions above, including the exercise of discretion contained in Direction No. 21.
43. Mr McInerney made the submission that the Tribunal found that Mr Guo made false and misleading declarations in his protection visa application dated 12 May 1997, in respect of his name and date of birth. He also falsely claimed that he was persecuted in China because of his religion in circumstances where there was no evidence, even from himself, that he had been persecuted for that reason. The Tribunal decision clearly sets out the evidence that it used in determining whether Mr Guo satisfied or failed the test:

He engaged the services of, and had more than a fleeting association with, a person he knew to be a people-smuggler. Mr Guo obtained from him a false passport and visa to enter Australia, he entered Australia using a false passport and visa issued to another person, and identified himself as that person. He had in his possession and under his control a visa granted to another person, he made false and misleading declarations in a protection visa application dated 12 May 1997, including as regards his name, his date of birth and that he was persecuted in China inter alia because of his religion, when there is no evidence, even from the applicant himself, that he was persecuted for any reason; he overstayed his tourist visa and two bridging visas for a total period of approximately 19 months; and made no attempt to depart until he was detected by compliance officers; while an unlawful non-citizen he worked in Australia without lawful permission to do so, and indeed at all times intended to work when he came to Australia on his tourist visa. (CB 353)

44. The Tribunal expressly considered whether or not the applicant's breach of the Act either individually or accumulative was serious. It made the following findings:

The direction, which is binding on this Tribunal, states in paragraph 2.6(c) that offences against the Act, including "making a false or misleading statement in connection with entry or stay in Australia", are to be treated as very serious. I find that the visa applicant's breaches of the Migration Act both individually and especially accumulatively, are particularly serious. (CB 355)

45. I accept Mr McInerney's submissions that this element of ground two is not made out and cannot be sustained.

46. The second element in ground two was that the Tribunal was required to consider, *inter alia*, whether the applicant and her husband were in a genuine and continuing relationship at the time that the visa applicant lodged his application, on 21 November 2002 and the time of the decision on 1 October 2004. The couple were married on 14 March 2002. Mr Turner argued that by considering the couple's relationship in 1996, and placing considerable weight on their relationship at that time, the Tribunal applied the wrong test. The requirements are set out in the *Migration Regulations 1994 (Cth)*:

regl.15A

Spouse

(1)...

(1A) Persons are in a married relationship if:

(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and

(b) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them is genuine and continuing; and

(iii) they:

(A) live together; or

(B) do not live separately and apart on a permanent basis.

47. A brief chronology of the applicant and visa applicant relationship is as follows:

- (a) The visa applicant (Guo) entered a genuine relationship with the applicant (Lee), April 1996 (applicant's statement of facts and contention (CB 262));
- (b) Visa applicant Guo moved to Sydney, October 1996 (CB 359);
- (c) Visa applicant Guo returns to China, 1 June 1999 (CB 346);
- (d) Mr Guo divorced former wife, May 2001;
- (e) Mrs Lee visit China for 6 weeks, February/March 2002;
- (f) Mr Guo and Mrs Lee marry in China, 14 March 2002;
- (g) Mr Guo lodges an application for a sub-class 309 spouse provisional visa, 21 November 2002;
- (h) Delegate refuses to grant visa, 11 August 2003;
- (i) Mrs Lee lodged an application for review of the decision, 24 September 2003;
- (j) Tribunal decision, 1 October 2004.

48. Mr Turner contends that by the Tribunal considering the couple's relationship in 1996 and placing considerable weight on their relationship at that time, the Tribunal applied the wrong test. While it is noted that Mrs Lee's solicitor details in his submissions the date in which the relationship commenced. Further details of the relationship are recorded in the Tribunal decision which further details the nature of the relationship between the parties during the time that they were both in Australia:

At the hearing, the respondent's representative stated that the issue of the genuineness of the marriage would not be pressed, but there were nevertheless doubts about the relationship. He pointed to the conflicting evidence that had been given by the applicant and the visa applicant as to whether they had lived together prior to their marriage. Mrs Lee said in a letter to the Department dated 14 May 2003, that she

and Mr Lee had been living together for two or three years. However, when questioned, Mrs Lee said they did not live together, but that she and her children lived in the former matrimonial home where Mr Guo would come to visit her when her husband was away. When Mr Guo moved to Sydney, Mrs Lee and her children visited him every school holidays in 1997, 1998 and the beginning of 1999. Mrs Lee stated that she had only ever stayed with him in the one house, at Burwood, during her visits. Mr Guo, on the other hand, from the start gave evidence that they did not live together. He said that he used to visit Mrs Lee when her husband was away, as a friend. They did not have an intimate relationship until shortly before he left Melbourne because he felt they should get to know each other. He gave evidence that when he moved to Sydney, while he always lived in the suburb of Burwood, he actually stayed at three different addresses. Mrs Lee said she visited only once. (CB 360)

49. The only other time that the couple cohabited was during the period that Mrs Lee visited China to participate in the marriage ceremony with Mr Guo. That visit lasted for a period of six weeks in 2002.

The applicant in her statement of facts and contentions (Exhibit A1), prepared by her then solicitor, Peter Coroneos, however, rejects the respondent's conclusion that the marriage is not genuine and point to the visa applicant's visit to China in 2002, to her numerous telephone calls to her husband, to the birthday presents she sent him, to photographs of the two spouses together and the opinions of her daughter and niece, who accompanied her to China at that time. (CB, 360)

50. The suggestion that the couple's relationship in 1996 was the basis for the decision on whether they had a genuine and continuing relationship is not reflected in the decision of the Tribunal and this ground cannot be sustained.
51. The third issue raised by the applicant under the heading "The Wrong Test" is that the Tribunal found, by implication, that Mr Guo was entirely responsible for violations of immigration law. The claim is that the Tribunal found by implication that by constantly blaming others for admitted violations of the immigration law, the visa applicant was "entirely responsible for those violations without making a finding as to whether the blame fairly lay". Mr Turner contended that consistently blaming others does not, of itself, support a finding that the blamer is entirely liable.

52. Mr McInerney submitted that the Tribunal found, as a fact, that the applicant had committed a number of breaches of the immigration legislation. The Tribunal clearly set out its findings in paragraph 61 of the decision:

Before making a decision on whether Mr Guo passes the character test, it is appropriate to set out my findings of fact on that issue. I find that the visa applicant committed a number of breaches of the immigration legislation. He engaged the services of, and had more than a fleeting association with, a person he knew to be a people-smuggler. Mr Guo obtained from him a false passport and visa issued to another person, and identified himself as that person. He had in his possession and under his control a visa granted to another person, he made false and misleading declarations in a protection visa application dated 12 May 1997, including as regards his name, his date of birth and that he was persecuted in China inter alia because of his religion, when there is no evidence, even from the applicant himself, that he was persecuted for any reason; he overstayed his tourist visa and two bridging visas for a total period of approximately 19 months; and made no attempt to depart until he was detected by compliance officers; while an unlawful non-citizen he worked in Australia without lawful permission to do so, and indeed at all times intended to work when he came to Australia on his tourist visa. The respondent contended in Exhibit R2 that the marriage between the applicant and the visa applicant is not genuine and was entered into for the purpose of facilitating a migration outcome. (CB 353)

53. The Tribunal member from those findings concluded that the applicant is not a person of good character with the following finding:

I conclude on the basis of these associations, multiple breaches and instances of deceitful conduct that the visa applicant is not a person of good character. (CB 353.8)

54. I accept the submission of Mr McInerney that the applicant's complaint cannot be sustained and should be rejected.
55. The fourth issue raised by Mr Turner under the heading "The Wrong Test", is that the Tribunal found that any association with a criminal was sufficient to support a finding that a person does not pass the character test. Mr McInerney submits that the Tribunal made no finding to that effect. The Tribunal commented on a decision of a presiding Deputy President in *Hapugoda & Minister for Immigration & Multicultural & Indigenous Affairs* [2002] AATA 330 at [54] that past associations with someone the Minister reasonably suspected of criminal conduct is enough in itself to cause a person

to fail a character test. This was an observation made by the Tribunal in respect of the issue under consideration. However, it was not a finding that the Tribunal made. The relevant finding in the context of the present case, was that the visa applicant had engaged the services of a person he knew to be a people-smuggler. Mr McInerney submits that this finding was open to the Tribunal to make.

56. The fifth issue raised by Mr Turner on behalf of the applicant was that the Tribunal found that the refusal of Mr Guo's visa could be used as a substitute for prosecution. Mr Turner argued that the Tribunal found that visa refusal could be used as a substitution for prosecution (CB 356 at [68]) and that criminal law prosecution and punishment of individuals has no place in the Act, nor Direction No. 21 (see *Djalic v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 151 at [73]; *Re Michael Alexander McCutcheon & Minister for Immigration & Ethnic Affairs* AAT no.79/18006 per Davies J). Mr Turner contended that by applying the wrong test the Tribunal committed a jurisdictional error.
57. The Tribunal observed that "in any given case the Minister may properly decide for any one of a number of reasons to use the remedy of 'visa refusal'". This was instead of leaving it up to a prosecuting authority whether or not to bring criminal proceedings against a person for breach of criminal law. The Tribunal's observation arose merely in response to a submission made by the applicant during the course of the Tribunal hearing. It observed that the Minister's failure to prosecute Mr Guo showed that his breach of the Act was not serious in a criminal sense. Again, this is an observation by the Tribunal and is not a finding of fact to that effect. I believe this is an observation made by the Tribunal and cannot be characterised as applying the wrong test.
58. The third ground concerns a claim that the Tribunal failed to take into account relevant considerations. The first issue raised under this ground is that the Tribunal failed to take into account that the medication being taken by the applicant (Mrs Lee) could only be obtained under prescription and that such prescriptions could only be obtained if the applicant personally attended a doctor in Australia. The family could not therefore, contrary to the findings of the Tribunal, arrange to have such products sent to her in China. The Tribunal's findings are set out in CB 362 at [85]:

The other aspect of hardship relates to Mrs Lee's health problems. While the evidence does not support her claim that she knew she was mildly diabetic from 2001 onwards, there is no doubt that this year she has developed insulin-dependent type 1 diabetes. She also undoubtedly suffers from the other complaints mentioned above. Mrs Lee said that the sickness she experienced while in China in 2002 showed that she could not live in that country. Again, the evidence does not support her claim that she suffered any significant health problems during that period, but on the other hand I accept that while insulin is apparently available, three local hospitals have not carried the named medications that she is currently taking. What is not clear is whether corresponding generic drugs are available, or are likely to become so now that the Chinese government is expanding its diabetes treatment programs or whether trade-named Western medications are available at a price Mrs Lee could afford. Mrs Lee appears not to have investigated the possibility of her family's arranging to have such products sent to her if she were to move to China to join Mr Guo. Nevertheless, it is safe to conclude that Mrs Lee would suffer some hardship as a result of her health problems if Mr Guo were refused a spouse visa and she were to relocate to China.

59. The Tribunal accepted that Mrs Lee would suffer some hardship as a result of her health problems, if the visa applicant was refused a spouse visa and she had to relocate to China. It is clear that this finding of fact was made at a high level of generality and that the Tribunal made a finding of fact favourable to Mrs Lee.
60. The second issue raised by the applicant in respect of the third ground – the failure to take into account relevant considerations – was that the Tribunal failed to take into account the applicant's evidence that "he did not know that the person who arranged his passport and travel to Australia was a criminal until his return to China". The applicant had given evidence to an immigration officer at the Australian Consulate on 4 March 2003. This information was inconsistent with the subsequent claim that he "did not know that the person who arranged his passport and travel to Australia was a criminal until after he returned to China. The Tribunal took into account both pieces of evidence and rejected Mr Guo's later claim, giving greater weight to the evidence previously given to the immigration officer.
61. The third issue raised in the third ground was that the Tribunal failed to take into account evidence that the applicant signed blank forms which were filled in by his agent. The decision records the following evidence given by the visa applicant:

In relation to the false statements in the protection visa applications, Mr Guo maintained that he had signed blank forms and that the migration agent had filled in the information. It was pointed out to him that the first protection visa application showed his wife's and sons' correct given names together with the false surname. He replied that he gave the first agent correct information but had signed the form in blank. There was considerable cross-examination about his three addresses in the Sydney area as shown on the two protection visa applications, Nicholson Street and Waimeea Street, Burwood, and Enmore Road, Enmore. He claimed that his first migration agent made up the Nicholson Street address, the second agent invented the Enmore Road address and he had never lived at either place and did not know those addresses. That was most implausible, especially given that the department's letter notifying him of the rejection of his first protection visa application was addressed to him at Nicholson Street. The question of his correct address in Sydney was material to the issue of his relationship with Mrs Lee. (CB 344)

62. Clearly, the Tribunal did have regard to that claim and subsequently rejected it. Mr McInerney submits and I accept his submission that the applicant's evidence displays a consistent pattern of seeking to blame others for his alleged admitted violations of the migration law and the Tribunal accepted that the evidence supported that view.
63. The fourth issue raised in ground three was that the Tribunal made a finding to the effect "that the visa applicant was not invited by his solicitor to say anything about how he proposed that they should live in Australia, whether he would be able to find work, given his lack of English, where they would live and how they would maintain themselves financially, nor was there anything in the documentary evidence on these topics". Mr Turner submitted that all these matters were relied upon by the Tribunal and were irrelevant to its consideration of whether Mr Guo failed the character test. Mr McInerney submitted that an applicant is entitled to support his application by such information or material he thinks appropriate. He cannot complain if the decision-maker rejects his application because he does not accept, without further notice to him, what he puts forward: *Kioa v West* per Mason J at 587. The Tribunal simply weighed the balance, in the absence of any evidence from the applicant in respect of those issues. However, the Tribunal made no finding in respect of the failure to provide that information.

64. In the fourth ground, the applicant complained that the Tribunal made findings of fact which were not based on reasonably probative evidence and identified five examples:

- a. *“particularly in light of what is known about Fuqing City’s role as a major centre for the people smuggling traffic of which more is said below” Paragraph 27.*
- b. *“Even then, he attempted to maintain the deception until questioning by departmental officers forced him to admit that he entered Australia under a false passport and was still using that identity” Paragraph 35.*
- c. *“The true situation would appear to be that Mrs Lee spend school holiday times in Sydney with Mr Guo more than once, but not, contrarily to her assertion, during every school holidays over that period. Paragraph 41.*
- d. *“Mr Guo claimed and still claims to be a Christian but I am not persuaded of that” Paragraph 67.*
- e. *“These matters invoke sympathy and merit compassionate consideration. Nevertheless, they stem from choices freely made by the parties in full knowledge of the facts and the risks involved.” Paragraph 87.*

65. Mr Turner submitted that the Tribunal’s failure to base its decision on reasonably probative evidence and to base it on mere speculation resulted in the Tribunal falling into legal error: *Minister for Immigration & Ethnic Affairs v Pochi* [1979] 44 FLR 41 per Deane J at [67]; *Inderjit Singh v Minister for Immigration & Multicultural Affairs* [1998] 1366 FCA. Mr Turner submitted that on the basis that the Tribunal decision is affected by one or more jurisdictional errors, the applicant is entitled to the relief sought.

66. Mr McInerney contends that a fair reading of the Tribunal’s decision does not support the applicant’s intention in respect of particulars (a) to (e) set out above. Each of the matters described in those five points do not constitute findings of fact. The Tribunal’s findings are set out in paragraphs 55 to 87 of its decision. The one particular issue raised on behalf of the applicant falls within the issues raised above is item (d), where the Tribunal did not accept the applicant’s claim to be a Christian. This finding turned on the Tribunal’s assessment of the applicant’s credibility. In respect to the Tribunal’s rejection of the applicant’s credibility and the Tribunal’s finding that the

applicant was not a person of good character, it was open to it not to accept his claim to be a Christian.

67. In respect of particular (e), the applicant impugns the Tribunal's finding that any disruption and hardship caused to Mrs Lee and Mr Guo stem from the choice freely made by Mrs Lee in 1996 to enter into a relationship with Mr Guo though she knew his presence in Australia was unlawful. They include disruption caused by the visa refusal and any hardship Mrs Lee might suffer because of health problems if she moved to China. This finding was open to the Tribunal on the material before it. Mr McInerney submitted in respect of particular (e), that want of logic or irrationality are not synonymous with error of law. If an inference appears to have been drawn as a result of illogical reasoning, provided the particular inference was reasonably open on the material available, no error of law has taken place: *Minister for Immigration & Multicultural Affairs v Al-Miahi* [2001] FCA 744 at [34]; *Minister for Immigration & Multicultural & Indigenous Affairs v W306/01A* [2003] FCAFC 208 per French and Hill JJ at [46] and Marshall J at [78]; *NAHD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 214 ALR 264.

68. After re-reading the Tribunal decision, I accept the submissions made by Mr McInerney that particulars (a) to (e) do not give rise to a finding of jurisdictional error.

69. Conclusion

70. Advocates for both parties have made detailed and considered written and oral submission to this Court. I am not satisfied that any of the grounds pleaded and argued for the applicant can be sustained and no jurisdictional error is established. Consequently, the application should be dismissed.

71. I am satisfied that an order for costs should be made in this matter. I order that the applicant pay the respondent's costs and disbursements of and incidental to the application.

I certify that the preceding fifty-seven (57) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM

Associate:

Date: 16 March 2006